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No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Opening Brief for Clarence E. Cabell, *et al.*, Appellants.

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Questions Presented.

1. Does a probation officer in California, in light of that state's statutory duties, fall within that group of public service positions which the state and local governments may reserve for American citizens; Is California's statute which requires deputy probation officers as peace officers to be United States citizens unconstitutional as applied?

2. Is the California statute which provides that public officers declared by law to be peace officers must be citizens of the United States unconstitutionally overbroad when construed in light of a separate companion statute which specifically declares and identifies deputy probation officers to be peace officers?

3. Did the plaintiffs who were applicants only for the deputy probation officer position have standing to challenge California Government Code Section 1031a as overbroad because it included by separate statutory reference other job categories?

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Opinions Below.

The Order of the Chief Judge of the Circuit Court convening the three-judge court and the basis for such action is set forth in the initial opinion of the three-judge district court, dated February 3, 1977, and is reproduced in Joint Appendix, p. 42, note 4. The jurisdictional basis for the Court's action was readopted in their subsequent opinion dated June 4, 1980, and reproduced in Joint Appendix 37.

The opinion of the three-judge district court (including dissent) dated June 4, 1980, from which this appeal is taken is not officially reported. It is reported as 23 FEP Cases 106 (1980) and is reproduced in Joint Appendix 76.

The opinion of the three-judge district court, dated February 3, 1978, is reported at 427 F.Supp. 158 (C.D. CA). It is reproduced in Joint Appendix 37.

Jurisdiction.

The jurisdiction of this Court is conferred by 28 U.S.C. Section 1253.

Jurisdiction of the three judge district court was based on 28 U.S.C. Section 1343(3), and 28 U.S.C. Section 1331. The three judge court was convened under 28 U.S.C. Section 2281 and 2284.

The judgment of the three-judge district court was entered August 19, 1980, and is reproduced in Joint Appendix 100.

The Notice of Appeal to this Court was filed on October 20, 1980 and is reproduced in Appendix C, to the Jurisdictional Statement.

Constitutional and Statutory Provisions Involved.

1. The Equal Protection clause of the 14th Amendment to the United States Constitution, to wit;

> "nor deny to any person within its jurisdiction the equal protection of the laws".

2. 42 United States Code § 1981

> "All persons within the jurisdiction of the United States shall have the same right in every state . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ."

3. California Government Code Section 1031(a) which provides in pertinent part:

"Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:

(a) Be a citizen of the United States: . . ."

4. California Penal Code Section 830.5 which provides in pertinent part:

"(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer or deputy probation officer is a peace officer . . ."

Statement of the Case.

This is the County of Los Angeles' second appeal in this action, the original judgment having been ordered vacated by this Court on May 15, 1978. 436 U.S. 901.

The three plaintiffs, Chavez-Salido, Bohorquez, and Ybarra, all applicants for the position of deputy probation officer with the Los Angeles County Probation Department, filed suit in federal court after being refused employment because they were not United States citizens. Their first amended complaint upon which the case was tried challenged California Government Code § 1031a which requires citizenship of employees declared by law to be peace officers (California Penal Code § 830.5 provides that probation officers are peace officers) on the grounds that it violated the equal protection clause of the 14th Amendment and contravenes two provisions of the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1983. Their claim was unlawful discrimination based on alienage. Two of the plaintiffs sought money damages in the nature of back pay and all sought attorneys fees. (J.A. 41)

Appellees Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County.

Appellee Chavez-Salido applied for the job of Deputy Probation Officer II on March 27, 1975. On the required civil service examination, Chavez-Salido scored a passing grade of 95. In September he was informed a job opening existed but would have to show proof of citizenship to be to the position. Solely because he was unable to do so, he was denied this position. Chavez-Salido applied for and was granted citizenship on March 15, 1976. (J.A. 39)

Appellee Ybarra applied for the positions of Deputy Probation Officer (DPO) I and II in October and August of 1975 respectively. He was informed of the citizenship requirement for both positions and, being unable to show proof of his citizenship, was denied employment as a DPO I and a position on an eligibility list for DPO II. These denials were solely the result of the statutory citizenship requirement of Section 1031(a) of California's Government Code. Ybarra has not applied for American citizenship. (J.A. 40)

Appellee Bohorquez applied for the position of Deputy Probation Officer II in January of 1975. During the civil service examination, he was informed he could not be appointed to the position because of his lack of citizenship. In light of this information, he did not avail himself of his right to appeal the failing score he received on his examination. At the time of the court's decision, Bohorquez had not filed for United States citizenship. (J.A. 40)

All parties agreed a three-judge court was appropriate and on April 26, 1976 the Chief Judge for the Ninth Circuit convened the court from which this appeal is being taken. The case was originally tried and argued August 20, 1976 on stipulated facts and uncontradicted affadavits.

The district court held it had jurisdiction over the County of Los Angeles under 28 U.S.C. Section 1331(a) in that

Appellees' complaint stated a cause of action under both the Fourteenth Amendment and 42 U.S.C. Section 1981 and the amount in controversy exceeded $10,000.

In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977) Joint Appendix 37 herein), the three-judge district court declared California Government Code Section 1031a to be unconstitutional, finding that the statute involved a suspect classification to which the strict scrutiny test must be applied.

The district court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, this Court ordered the judgment of the three-judge district court vacated and remanded the case to the three-judge court "for further consideration in light of *Foley v. Connelie*, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and reargued before the three-judge district court on December 8, 1979.

Since the original 1977 decision, plaintiff Chavez-Salido left County employment altogether and no longer sought injunctive relief with reference to appointment. The district court did not consider his case moot because his prayers for back pay and attorneys fees remained viable. (J.A. 77, N.2). In the second proceeding the federal district court took judicial notice of certain provisions of California law defining the powers and functions of probation officers, which statutes were not mentioned in the previous opinion, *i.e.*, Code of Civil Procedure Section 131.3 *et seq.*; Penal Code Section 1203 *et seq.*; Welfare and Institutions Code Section 280-83, 727 *et seq.* (J.A. 77, N2).

In an opinion filed June 4, 1980, the three-judge district court (with Judge Curtis dissenting) again applied the strict scrutiny test and reached the same result, declaring Section 1031a of the Government Code unconstitutional on the

grounds that the statute was 1) unconstitutionally overbroad and 2) the statute violated the Equal Protection Clause of the 14th Amendment as applied to plaintiffs herein. (J.A. 77,78). The court rejected appellants' arguments that the plaintiffs who were applicants only for the deputy probation officer position lacked standing to challenge the statute's application to other statutory classifications of peace officer (J.A. 82, note 7).

Judge Curtis dissented, being of the opinion that in light of this Court's decisions in *Foley* v. *Connelie*, 435 U.S. 291, 98 S.Ct 1065 (1978) and *Ambach* v. *Norwick*, 441 U.S. 68, 995 S.Ct 1589 (1979) that probation officers performed significant governmental functions and exercised such a high degree of discretion that they were a part of the political community and, therefore, under the guidance of *Foley* and *Ambach* a rational basis existed for the statutory restriction to U.S. citizens (J.A. 99). Moreover, Judge Curtis believed that plaintiffs, being applicants only for the position of deputy probation officer, lacked standing to challenge § 1031a's application to other statutory defined categories of peace officer. In Judge Curtis's opinion the categories of peace officer were separately and precisely defined so as to permit the application of Constitutional principles on any category challenged (J.A. 93).

On December 17, 1980, the appeal was docketed and this Court noted Probable Jurisdiction on March 9, 1981.

Summary of Argument.

The three judge district court erred in applying the strict scrutiny test to find that California's citizenship requirement for probation officers violated the Equal Protection Clause of the Constitution and 42 U.S.C. §§ 1981, 1983. California probation officers perform significant governmental functions and exercise important sovereign powers that make

them a part of the political community to whom citizenship may be a valid prerequisite for employment.

In California, and undoubtedly in all other jurisdictions, deputy probation officers exercise some of the most essential powers of government — those powers directed toward the punishment and rehabilitation of criminals and the treatment of juvenile offenders. Probation officers are an integral component of the criminal justice system, along with police officers, prosecutors, judges and jurors. They execute important and broad public policy in that area, and perform a vital role in one of the most basic and protective functions of state government.

The probation officer is given power by the court and by statute to interfere directly and deeply in the life of the probationer *on behalf of society*. He makes recommendations to the court on the sentencing and release of offenders and the terms and conditions of probation. The probation officer has the power to approve or disapprove the employment, residence, and associations of a probationer; he may, depending on case factors, also have power over his use of his income, and over his right to keep weapons. In some situations the probation officer may have the power to search and seize the probationer's person and property without a warrant. In all these, the probation officer exercises discretion in behalf of broad public policy.

An analysis of the probation officers' responsibilities and functions clearly reveals that they possess in even greater measure the important job characteristics that this Court found persuasive in upholding citizenship requirements for police officers in *Foley v. Connelie*, 435 U.S. 291 (1978), and public school teachers in *Ambach v. Norwick*, 441 U.S. 68 (1979). If citizenship may constitutionally be required of public school teachers or police officers, it is apparent in light of the role of probation officers in our criminal

justice system and the duties prescribed by the California statutes, the citizenship may also be required of probation officers.

In light of the probation officer's public responsibilities and significant role in the criminal justice system, the state need only show some rational relationship between the interest sought to be protected and the limiting classification — that rational relationship exists and California's citizenship requirement for probation officers is constitutional.

California's statutory scheme which provides that employees "declared by law to be peace officers" shall be citizens is not unconstitutionally overbroad when separate statutes identify and declare each public position to be accorded peace officer status. A reading of California Government Code § 1031a in conjunction with the specific peace officer statutes, provides an easily recognizable and explicit standard and the district court below inappropriately applied the facial overbreadth doctrine.

The plaintiffs were rejected applicants only for the position of probation officer — a position which constitutionally may be restricted to citizens. As such, the plaintiff lacked standing to challenge the application of California's citizenship statute to other occupations.

ARGUMENT.

I.

PROBATION OFFICERS IN CALIFORNIA ARE A CLASS OF PUBLIC EMPLOYEES THAT CAN BE REQUIRED TO BE UNITED STATES CITIZENS; AS APPLIED, CALIFORNIA GOVERNMENT CODE § 1031a IS CONSTITUTIONAL.

Deputy Probation Officers (hereafter referred to as probation officers)[1] by virtue of their statutory duties perform functions that not only conform to, but actually exceed the threshold criteria recognized by this Court in *Foley* and *Ambach* as justifying a citizenship requirement. The majority below, while recognizing that employment activities which promote civic virtues, serve as role models for members of society, and influence the attitude of the public toward its government and the justice system, are indicia of membership in the political community that may be reserved to citizens, erred in failing to give effect to these criteria in the context of the probation officer position.

This Court long ago recognized that there may be valid distinctions between public and private employment with regard to citizenship requirements. *Truax* v. *Raich*, 239 U.S. 33, 36 S.Ct. 7 (1915). Recently, the Court in *Foley* v. *Connelie*, 435 U.S. 291, 98 S.Ct 291 (1978) and *Ambach* v. *Norwich*, 441 U.S. 68, 99 S.Ct 1589 (1979) clarified and expounded upon the general principle announced in *Sugarman v. Dougall*,[2] 413 U.S. 634 (1973) in holding that

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[1]The duties of a deputy probation officer in California are the same as his principal, the Probation Officer, and both are included within the citizenship requirement. (Code of Civil Procedure § 131.4, Penal Code 830.5, Welfare & Institutions Code § 283, J.A. 106)

[2]In *Sugarman, supra* at 2850 the Court indicated that when appropriately defined the state could restrict to citizens those "state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government".

when the public employment involved performance of significant governmental functions, the employee is within the basic concept of a political community which can be legitimately restricted to citizens. In such circumstances the strict scrutiny test was not applicable and the state could sustain its citizenship requirements by showing some rational relationship between the requirement and a legitimate state interest. *Foley* v. *Connelie*, *supra* at 1074; *Ambach* v. *Norwich*, *supra* at 1596.

In *Foley* the Court found that a state police officer performed such significant public functions that the position could be restricted to citizens. The Court reached the same conclusion with regard to public school teachers in *Ambach*. The Court's decisions in *Foley* and *Ambach* defined more precisely the broad doctrine announced in *Sugarman*, *supra* at 2850 that citizenship could be required of holders of "important non-elective executive, legislative and judicial positions [and] officers who participated directly in the formulations, executions, or review of broad public policy. . . ." Although police officers and public school teachers did not participate in the formulation of broad public policy, they were responsible for executing it and in so doing exercised considerable discretion. Their activities significantly impacted on other citizens so that their occupations could not be said to be a "common occupation of the community or equated with a private person engaged in routine public employment" as may be present in the more narrow disciplines or trades.

In light of the guidance established in this Court's recent decisions, the issue herein may be identified as being whether the duties of probation officers and their role in the criminal justice system place them in the *Foley* (police officer) - *Ambach* (public school teacher) classification of public employees or on the side of the more common oc-

cupations that do not perform significant public functions. Even a rudimentary analysis of the duties of a probation officer clearly indicate that they fall within the first category.

A review of the California Probation Officers statutory duties (which are not dissimilar to those existing in other states or in the federal probation service) clearly reveals that there exists an even more compelling argument that they are part of the political community than is the case with public school teachers or policemen.

Probation officers are non-elective officers who participate directly in the execution, if not the formulation, of broad public policy. They perform significant government functions, not only in helping to formulate criminal justice policy but in executing it in a manner that substantially affects all members of society. They are charged with enforcing the law and have some powers of arrest. Moreover, unlike police officers, they play a critical role in the treatment and rehabilitation of criminal offenders, both juvenile and adult. The criticality and impact of the performance of their manifold criminal justice functions clearly place them within the "political community" such that a citizenship limitation must be evaluated under the rational basis, not strict scrutiny test.

Significant Governmental Functions Performed by Probation Officers Which Impact on the Civil Rights of Citizens.

In California a probation officer performs the following broad range of duties:

a. General Responsibilities.

Probation officers perform three basic functions. Law enforcement, advisor to the courts, and treatment and rehabilitation of criminal offenders. All probation officers

including those in California perform all three functions in varying degrees at one time or another. As an essential component of the criminal and juvenile justice system, the probation officer's role has far more scope than the more limited role of the police officer.

The importance and influence and discretion of the probation officer was noted by this Court in *Gagnon* v. *Scarpelli*, 411 U.S. 778, 784 (1973) wherein the Court said:

> "Because the probation of parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation."

Similarly, in the context of juvenile detention proceedings the California Supreme Court has noted that "while the purposes of such an interview are relatively restricted, however, the latitude given the probation officer in reaching a detention decision, and the effect of that decision on the minor, are substantial." *In Re Wayne H.*, 24 Cal. 3d 595, 601, 596 P. 2d 1 (1979).

The Probation Officer's relationship with the court is substantial, direct, and an integral part of the criminal justice system. It is recognized that probation officers regularly perform quasi judicial functions.[3] A U.S. Department of Justice study on the probation systems enumerates them as follows[4]

1) Plea bargaining and sentencing influence.

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[3]*Critical Issues in Adult Probation; Issues in Probation Management*, (1979) U.S. Dept. of Justice, LEAA, p. 46.

[4]*Id.* at 46-47.

2) Determination of which juvenile cases are appropriate for judicial processing and which should be handled informally. Like prosecutor, this function permits the probation officer to have some control over intake to the court.
3) Setting or influencing the terms and conditions of probation.
4) Enforcement of the conditions of probation and exercise of discretion in initiating probation violation procedures.
5) Administering or enforcing punishment by restricting the liberty of the person on probation.

b. Arrest Powers.

Probation Officers as peace officers have the power of arrest (California Penal Code § 830.5, Welfare and Institutions Code § 283, and Code of Civil Procedure § 131.4). Although not as broad as the arrest authority of a police officer, they have the general power of arrest within their statutory jurisdiction and may arrest upon suspicion.[5] Violation of probation is cause for immediate rearrest by the probation office without an arrest warrant (California Penal Code § 1203.2). Probation Officers may take into custody juveniles before and after court proceedings and have important release functions over adult offenders who are placed under their direct supervision. They may order the temporary release of inmates incarcerated in County jails for the purpose of preparing them for release to the community (Penal Code § 1203.1(a)).

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[5]This Court noted in *Fare* v. *Michael C*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 at 209, note 5, that: "And a probation officer in California continues to have the powers and authority of a peace officer in connection with any violation of a criminal statute that is discovered by the probation officer in the course of his probation activities. § 282; Cal. Penal Code Ann. § 830.5 (West Supp. 1970)."

c. Supervision and Rehabilitation of Criminal Offenders.

Probation Officers play an important role in the criminal justice system through their supervisory responsibility over adult and juvenile offenders. They must insure that all conditions of probation are obeyed (Penal Code § 1203.1), and if they determine that a violation of probation has occurred, it is cause for the immediate arrest of the offender (Penal Code § 1203.2). Deputy Probation Officers supervise out-of-state parolees and must be familiar with, and dedicated to, the enforcement of not only the law of California but the law of the United States and other States (Uniform out-of-State Parolee Supervision Act, California Penal Code §§ 11175-11179).

After conviction it is upon the probation officer's shoulder that most of the burden falls in supervising the rehabilitation of the offender and his return to law abiding behavior. Society entrusts the probation officer with this most important responsibility in the hope that it will be protected from future manifestations of anti-social behavior. The importance and impact of these rehabilitation duties cannot be underestimated.[6]

d. Advisor to the Courts.

Probation Officers are required to report to the court factors to be considered in aggravation or mitigation of punishments for a crime and whether probation should or should not be granted (Penal Code § 1203). The Probation Officer's

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[6]The United States Department of Justice, in *Critical Issues in Adult Probation; Summary* (1979) pg. 50, remarked on the results of a study reported to Congress entitled *State and County Probation; Systems in Crisis*, (1976) "The findings of the study indicated that probationers who received needed services were more likely to complete their probation periods successfully than those who did not receive the needed services".

review of the circumstances surrounding the offense, his appraisal of the individual's prior record, his assessment of the individual's adaptability to rehabilitation and his recommendations as to sentencing and probation are compelling, if not controlling, factors as to whether a convicted person will be incarcerated and how long, or freed on a term of probation. The Probation Officer's court report, which considers the social history, the past criminal record, and the current offense of the individual with a view to recommending release or incarceration, is based primarily on the probation officer's judgment of what is conducive to the good of the community (Penal Code § 1203.1a).

e. Juvenile Supervision.

In light of the role played by public school teachers that influenced the Court in *Ambach* to find that they were a part of the political community, it is instructive to review the comprehensive duties of California Probation Officers with regard to juveniles. It does not take extended analysis to establish that in many respects, and with more profound, long range implications, probation officers have even greater impact and influence on the freedom and rehabilitation of juvenile offenders than is the case with adults.

Probation Officers in California have a highly discretionary role with regard to juvenile offenders and dependent, abandoned or neglected minors. Probation Officers determine whether court proceedings should be instituted against juvenile offenders and whether to release or detain juveniles accused of criminal or delinquent acts (Welfare and Institutions Code §§ 628 and 630). They have a specific statutory responsibility to advise minors of their constitutional rights (Welfare and Institutions Code § 627.5). Probation Officers take custody of juveniles before and after court proceedings, represent the interests of juveniles in such proceedings, pre-

pare social studies on the minor and make recommendations to the court for the proper disposition of the case (Welfare and Institutions Code § 280).[7] The care, custody, control and conduct of the minor may be given to the probation officer to supervise as best he sees fit (Welfare and Institutions Code §§ 727, 730, 731).

California probation officers exercise great discretion and influence on the disposition of juvenile defenders in two critical aspects; 1) Intake, that is the decision made in evaluating the case whether to formally involve the juvenile court or to proceed without court intervention by informal counseling.[8] Which course the probation officer decides to take vitally affects the rights of the juvenile and his eventual rehabilitation. 2) Close supervision as a ward or dependent of the Court.[9]

In the typical adult criminal case, the probation officer becomes involved only after charges have been filed and

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[7]This Court noted these responsibilities in *re* v. *Michael C*, 442 U.S. 707, 61 L.Ed.2d 197, 209 N.9.

[8]The National Advisory Commission on Criminal Justice Standards and Goals in *Corrections* (1973) pg. 326 describe the juvenile intake process as

"The process of screening cases at the juvenile level and effecting adjustments without formal court intervention appeared almost as soon as the juvenile court was created. This process commonly is called 'intake'. It appeared in different forms as juvenile courts were created in different communities. Essentially it involved discretion to look into a matter and resolve it informally. . . . .

"The process called 'intake' has been practiced in different ways by various courts resulting in a variety of procedures. In some places, it was limited to screening out cases. In other places, the process was expanded to 'unofficial probation', which meant interaction among a child, family, and probation officer with all the ingredients of probation as a disposition by the court except formal court action."

[9]A ward of the court in California is a juvenile found to have committed an act which would be a crime if he were an adult or has committed certain delinquent acts. A dependent on the other hand is a victim of parental abuse or neglect and is not personally responsible for culpable acts. California Welfare and Institutions Code § 601, 602, § 300.

usually then only after conviction. They usually play no role in the initiation of criminal charges. On the other hand, in California and elsewhere, when a juvenile is identified as being neglected or having committed some delinquent act, the probation officer assumes jurisdiction and makes the initial decision as to how the case is to be processed. In accordance with his investigation and interpretation of numerous criteria the probation officer determines whether to release the minor to the custody of his parent or guardian (Welfare and Institutions Code § 628, 629) or file a petition in the juvenile court for retention of custody (Welfare and Institutions § 630). California Welfare and Institutions Code § 652 expressly imposes upon probation officers the duty to make investigations to determine in each case whether proceedings in the juvenile court should be commenced. In this capacity, the probation officer, unlike a police officer, assumes a prosecutorial role. Needless to say, considerable discretion must be exercised in performing these functions and the ultimate affect on the juvenile and his acceptance of and adjustment to societal norms may well hang in the balance. The National Advisory Commission on Criminal Justice Standards and Goals stated in *Correction*, at pg. 327

> "Decision making at the point of intake is extremely important. Two basic decisions must be made, and both involve a considerable amount of discretion. The first decision is relatively simple: does the matter fall within the jurisdiction of the court? For example, if the allegation is delinquency, is the child within the age range for that particular State? If there is jurisdiction, the second question is whether official intervention and the authority of the court are required.
>
> "These key decisions require that competent staff be assigned to intake work. The staff must be skillful interviewers, have a broad knowledge of resources

available, and be able to make decisions quickly.

"Probation staff have provided services prior to hearings in juvenile matters for some time, but they have been reluctant to do so at the pretrial stage for adults. The contrast is sharpest in the area of detention, both prehearing and pretrial.

"The premise usually is expressed in law that a child is to be released to parents unless there is a substantial probability the child will not appear in court or would commit, before the time of the court hearing, an act that would be a crime if done by an adult. Probation staff members assess a child's potential and may be authorized by a judge or by statute to screen children away from detention. Many children therefore are not detained."

The California probation officer performs another important function in the juvenile justice system by investigating the minor's background, behavorial patterns and social history and advising the court on the minor's fitness for being dealt with under the juvenile law. When the minor is determined to be unfit, he will be tried as an adult. (California Welfare and Institutions Code § 707.)

With regard to neglected, abandoned and abused children, the probation officer's powers are equally broad as he determines whether to file a petition to declare the minor a dependent of the court and appears on behalf of the minor in proceedings against the parents to obtain custody of the child in the child's best interest. In this capacity, probation officers act as a *guardian ad litem* for the juvenile and are responsible for his direct care, custody and control, as well as representing the minor's interest in Dependency Court proceedings (Welfare and Institutions Code § 326). An extremely important and far-reaching function in terms of its impact on the rights of minors and their parents is performed by probation officers in making recommendations to the

court for removal of juveniles from the custody of their parents. (California Welfare and Institutions Code § 356.)

Probation Officers play a more expanded and intimate role in the supervision of juvenile offenders than adults. As noted earlier the probation officer may divert the juvenile offender from the formal court process under a program of supervision (Welfare and Institutions Code § 654). The scope of this form of supervision includes counseling, maintenance and operation of shelter-care facilities, crises resolution homes, and counseling and educational centers (Welfare and Institutions Code § 654(a)(b)(c)). After adjudication, the probation officer's supervisory responsibilities include both in and out of custody supervision. A probation officer is charged with home supervision of the minor to assure that the minor obeys the conditions of release and commits no public offenses pending final disposition of his case (California Welfare and Institutions Code § 841).

California Probation Officers are charged with maintaining and operating juvenile custodial facilities within their County. Minors declared wards of the Court and committed to such a facility are under the constant care, control and supervision of probation officers 24 hours a day.[10]

Under such circumstances the influence of the probation officer, the role model he exhibits to the juvenile, and the rehabilitative effect he has on his charge, exceeds that of a public school teacher. The effectiveness of the entire juvenile justice process, in which the probation officer plays the most critical role, has the most profound impact not only on the individual but on society as a whole for teaching the juvenile to be law abiding, to observe societal norms, and to recognize the civic virtues, requires inculcation of the

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[10]California Welfare & Institutions Code §§ 850, 852, 881, 882.

basic rudiments of our democratic and constitutional way of life. A juvenile not so influenced is most likely to become the adult criminal of tomorrow.

When the substantial probation officer functions outlined earlier are measured against those job attributes recognized by this Court in *Foley* and *Ambach* as important criteria for determining whether the job holder performs a significant governmental function, the conclusion is inescapable that probation officers fall in the same category. In fact, they possess the essential characteristics of both the police officer and teacher functions. They are educators, enforcers, protectors of society, role models, rehabilitators, advisors to the courts and an integral component of the nation's criminal justice system.

As was the case with public school teachers in *Ambach*, probation officers are responsible for developing in their charges a positive attitude toward government and the political process, a recognition of the need to obey the law, and the acceptance of societal responsibilities within our democratic concept of a government of laws. Particularly in the case of juveniles, they are charged with promoting civic virtues and their personal qualities, expressed in a direct relationship with their wards, substantially influence the offender's perception, understanding, and acceptance of the responsibilities of a law abiding citizen.

The job functions noted with reference to police officers in *Foley* are likewise present, if not enhanced, in the case of probation officers. Probation officers have the power to arrest, albeit more limited. More significantly, they can in the exercise of their discretion, affect the freedom and liberty of other citizens — adults and juveniles in the supervision of their terms of probation, and juveniles in the exercise of the intake process.

Upon careful analysis, the lower court's attempted distinction of *Ambach* and *Foley* lack substance. While the district court noted that deputy probation officers are generally regarded as a part of the law enforcement apparatus of the community, act as advisors to the court, and have a unique duty to the state (J.A. 86, note 8), the court ignored the implication of those observations in determining that for citizenship purposes a probation officer is not a part of the political community.

Although in a very general sense the personal contacts arising from performance of a probation officer's duties may be narrower than a police officer's,[11] the impact of their performance extends far beyond the immediate relationship between the probationer and the offender and has tremendous consequences for the American public as a whole. How well the probation officer performs his manifold tasks has vital consequences on the efficiency of the criminal justice system, how it is perceived by the public, and how well the offender is rehabilitated and assimilated into lawful society.

The size of the population a public servant deals with on a daily or routine basis is too truncated and indeed a misleading criteria for determining whether the position in question is within the category of important non-elective officers

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[11]A probation officer's contact with the public is not so limited as the plaintiffs might suggest. By 1976 there were 923,064 adult probation clients under state and local supervision in the United States. *Critical Issues in Adult Probation, Summary* (1979), pg. 47, U.S. Department of Justice National Institute of Law Enforcement and Criminal Justice.

The United States Department of Justice noted that: "The results of this survey emphasize the fact *that the delivery of adult probation services is a big business*, even though the individual agencies are often quite small. *In the aggregate, probation touches more lives than any other area of corrections*. The scope of probation activity alone warrants a careful study of the methods used to manage and deliver its services." *Id* at 48. (Emphasis added).

who participate in the execution of broad public policy. There are many occupations with similar characteristics that without question may properly be reserved to citizens. Trial judges, public prosecutors and jurors are relevant examples. Their immediate contact is with that narrow segment of society charged with an offense or who appear for judgment. Yet the overall role of these individuals when judged in light of their ultimate impact on our society is great. So also is the case with probation officers.

The district court similarly erred in concluding that a probation officer's exercise of discretion was far less important than a police officer is because it lacked finality. The significance of "finality" is unclear as in our system of government that are very few public employees or officers whose acts can be considered "final" in any sense meaningful to the central issue herein. A police officer initiates the criminal proceedings by arrest but his role generally concludes with his testimony, if any. The term in custody of an individual arrested by a police officer pending a court hearing can be just as short as the detention of a juvenile offender by a probation officer.

The probation officer, who in many instances may initiate an arrest or revocation of probation, plays many roles before, during and after the sentencing. In a great many cases his influence continues for years after the formal judicial proceeding and when the arresting officer, the jurors, and the prosecuting attorney are no longer involved. In our system of criminal justice we rely primarily upon the probation officer to instill in the offender those fundamental values and norms of behavior and social responsibility that are necessary in a society governed by the rule of law.

The probation officer exercises great and very consequential discretion as the court's advisor on sentencing, methods of rehabilitation, the conditions and length of pro-

bation and possible revocation of probation and reincarceration. As noted earlier, a probation officer's responsibilities with regard to juveniles is broad and pervasive and in many respects has a greater long-range impact on how the juvenile ultimately relates to society than is the case with adults.

In *Foley*, this Court remarked that it would be anomalous for citizens to be subject to the broad discretionary powers of non-citizen police officers. The same observation is true of probation officers for they complete and execute the actions initially commenced by a citizen police officer and continued on by citizen prosecutors, judges and jurors.

Clearly a rational basis exists for a citizenship requirement for probation officers, as it did in *Foley* and *Ambach*. Those that undertake the effort to qualify and become a U.S. citizen are generally more familiar with, and most importantly, more *sympathetic* to American traditions. Becoming a citizen demonstrates acceptance and allegiance to the constitution as only actual citizenship can. As the Court observed in *Ambach* v. *Norwick*, *supra* at 1594, "An oath of allegiance cannot substitute for the unequivocal legal bond citizenship represents".

Citizenship may properly be required as a condition for appointment as a probation officer in California.

II.

A STATUTE WHICH PROVIDES THAT "EACH CLASS OF PUBLIC OFFICERS OR EMPLOYEES DECLARED BY LAW TO BE PEACE OFFICERS" SHALL BE A CITIZEN OF THE UNITED STATES IS NOT CONSTITUTIONALLY OVERBROAD WHEN A SEPARATE COMPANION STATUTE SPECIFIES THAT PROBATION OFFICERS SHALL BE PEACE OFFICERS.

In addition to finding the California citizenship requirement for probation officers unconstitutional as applied, the three judge court struck down § 1031a on the ground it was

unconstitutionally overbroad in that some of the separate statutory peace officer classifications (for which plaintiffs had not applied) might not be constitutionally restricted to citizens. The district court erred in this judgment by 1) inappropriately invoking the limited overbreadth doctrine under the facts of the case and 2) in ignoring the plaintiffs clear lack of standing to raise constitutional issues as to other separate statutory classifications which did not affect them.

Unlike the statute found constitutionally offensive in *Sugarman* v. *Dougall*, 413 U.S. 634, 635 (1973), California Government Code § 1031a does not declare that all civil servants must be U.S. citizens. Section 1031a is limited to public employees "declared by law to be peace officers".

To determine which public employees are required to be citizens because they are peace officers, one must look to the California statutes to determine what classifications are declared by law to have peace officer status. The California legislature has, through the mode of separate statutory enactments encompassing related categories of public occupations, declared certain positions to have peace officer status — Penal Code § 830.5 pertaining to peace officers is one of these.

In applying § 1031a the public employer has no discretion to determine which public positions have peace officer status. That status is accorded only to those classifications so designated in other provisions of public law. On its face § 1031a cannot be enforced without consideration of companion statutes and it is this characteristic that clearly distinguishes the *Sugarman* case. Those public positions granted peace officer status are identified in severable and separate California statutes, permitting to unrestrained discretion in the public employer in requiring citizenship as a condition of employment, and allowing each job class to

be separately evaluated as to the justification for a citizenship requirement.

Although application of a citizenship requirement must be made by reference to two statutes, in this case Gov't. Code § 1031a and Penal Code § 830.5, the effect in its application to the individual seeking employment is no different than if Penal Code § 830.5 or the other peace officer statutes each included in their language a citizenship limitation.

In finding § 1031a unconstitutionally overbroad, the Court below relied solely and unjustifiably upon the *Sugarman* case, which is clearly distinguishable on its facts and ignored this Court's guidance in *United States* v. *Raines*, 362 U.S. 17 (1960) and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). We believe that dissent below properly applied the *Raines* and *Broadrick* criteria to the facts of the instant case.

In defining the role of the federal courts in declaring statutes unconstitutional this Court observed in *Raines, supra* at 20-21:

> "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. (Citations omitted.) The same view stated in *Broadrick*

v. Oklahoma, 413 U.S. 601 (1973), when the Court said at 610:

'Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., *Austin v. The Aldermen*, 7 Wall. 694, 698-699 (1869); *Supervisors v. Stanley*, 105 U.S. 305, 311-315 (1882); *Hatch v. Reardon*, 204 U.S. 152, 160-161 (1907); *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-220 (1912); *United States v. Wurzbach, supra*, at 399; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513 (1937); *United States v. Raines*, 362 U.S. 17 (1960).' "

The lower court herein chose to ignore the constraints on the application of the overbreadth doctrine repeatedly expressed by this Court and clearly germane to the instant case. The overbreadth doctrine as this Court noted in *Broadrick* has been restricted primarily to First Amendment cases when no limiting construction could be placed on the challenged statute.

"Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See *Dombrowski v. Pfister*, 380 U.S., at 491; *Cox v. New Hampshire*, 312 U.S. 569 (1941); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); cf. *Breard v. Alexandria*, 341 U.S. 622." *Broadrick*, 413 U.S. at 613.

The Court also noted that application of the doctrine is disfavored when the statute at issue regulates conduct rather than expression.

The constraints on, and the very limited application of the overbreadth doctrine, were described in detail by this Court in *Broadrick* as follows.

> "But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct — even if expressive — fall within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id*, at 2917, 2918.

[12]Police officers are declared to be peace officers in California's Government Code § 830.1, which states in relevant part:

The court's observance in *Broadrick* above, that it is preferable to cure whatever overbreadth may exist through a case-by-case analysis is particularly germane to the issues at hand. For in striking down completely § 1031a the district court not only eliminated an admittedly valid citizenship requirement for police officers,[12] it assumed without the benefit of argument, evidence, or the presence of an aggrieved party, that other public occupations declared to have peace officer status in separate statutory provisions could not be restricted to citizens.

Looking at the matter from another perspective, would have, and could have the district court validly enjoined the application of § 1031a in conjunction with Penal Code § 830.1 (see footnote 12 below) if the plaintiffs were non-citizen applicants for the position of Los Angeles City policemen, merely on the ground that citizenship may not be constitutionally required for some other statutorily defined category of peace officer. We believe not.

Relating the overbreadth doctrine to the practical context of the case, appellants do not believe that there is any real constitutional difference between a series of independent and separate statutes each defining an occupation and specifying a citizenship requirement and a statute that imposes a citizenship requirement by reference to the other statutes, each of which separately identify the affected occupations.

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[12]Police officers are declared to be peace officers in California's Government Code § 830.1, which states in relevant part:

"Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, any policeman of a city, . . . is a peace officer."

A citizenship requirement for police officers is imposed in the same manner as for probation officers — through § 1031a by reference to Penal Code § 830.1.

III.
PLAINTIFFS LACK STANDING.

All of the plaintiffs in this case were applicants for only one class of position, deputy probation officer. There were no plaintiff applicants for any of the remaining classes of public positions granted peace officer status under other independant statutes. Being totally unaffected by the application of Section 1031a to these other job classifications, plaintiffs lacked standing to assert that Section 1031a was overbroad because it might include some categories, which upon careful analysis and with an aggrieved party may be found not to justify a citizenship restriction.

If the state can constitutionally restrict the position of probation officer to citizens, then plaintiffs are not aggrieved and lack a legal basis for raising the constitutionality of § 1031a's application to other job classifications. In this regard the *Sugarman* case was different in that the positions the plaintiffs sought were obviously ministerial and limited in scope and in the exercise of the state's sovereign power — *e.g.* clerk-typist, administrative assistant, counselor, and human resources technician. If this Court finds that the state may constitutionally limit employment to citizens in the specific job (probation officer) for which plaintiffs applied, then this Court's observations on standing in *Broadrick, supra* at 2914, 2915, are relevant and the plaintiffs are precluded from challenging § 1031a on grounds of overbreadth.[13]

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[13]The Court noted in upholding the state statute challenged in *Broadrick*, "Moreover, even if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the "hard core" of the statute's proscriptions and appellants concede as much." *Broadrick* v. *Oklahoma*, 413 U.S. 600, 608

The overbreadth doctrine is related to the concept of vagueness and lack of specificity.[14] These vices, however, are not present in California's statutory scheme, or are such factors present with regard to California's citizenship requirement for probation officers. The *Sugarman* case relied upon by the majority is clearly distinguishable as the New York Statute totally failed to restrict the citizenship requirement to any particular occupation within the extremely broad category of civil service positions. Even if under the broad civil service umbrella, there existed occupations that could justifiably be restricted to citizens (such as police officers) the New York statute simply did not identify them.

The effect of the California statute is to the contrary. The California statutes, although including many different occupational categories, are fundamentally different in application as the dissent observed. "[E]ach of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer could be more clearly defined." *Chavez-Salido* v. *Cabell*, 23 FEP Cases at 112, J.A. 93.

This Court had no difficulty in ascertaining that Section 1031a can be applied narrowly for it noted in its opinion in *Foley* v. *Connelie, supra* at 1072, note 8, that by virtue of § 1031, California was one of 24 states besides New

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[14]As correctly noted in the dissent, the overbreadth doctrine has been applied primarily in First Amendment cases. In those cases the Court could not have decided the case on a narrower basis because even if some behavior or occupation could constitutionally be restricted, the challenged statute was so broad in its terms that there would still remain the risk of unbridled scope and discretion in its application. In First Amendment cases this is a matter of particular constitutional concern because restraints on first amendment rights are justified only under the most compelling circumstances and this Court has continually condemned actions that have an unnecessary chilling effect on the exercise of those rights.

York that "*specifically* require United States citizenship as a prerequisite for becoming a member of a statewide law enforcement agency", (Emphasis added).

To follow the guidance of *Broadrick* and *Raines* as to the limitations on the application of the overbreadth doctrine and find the plaintiffs had no standing to raise constitutional issues outside of the context of probation officer positions is most appropriate under the facts of the case because 1) it would not result in an unconstitutional impingement of the plaintiffs' rights to employment as probation officers; 2) it would recognize and retain in effect California's constitutionally permissible restriction of police officer positions to citizens, and 3) it would conform to the oft-stated principle of this Court in citizenship cases, that each is to be decided on its merits on a case-by-case basis. *Foley* v. *Connelie*, 435 U.S. 291 at 296; *Examining Board of Engineers etc., et al,* v. *Re Otero*, 426 U.S. 572, 605.

The fact that California law provides no exception for aliens who have expressed an interest to become citizens but have not yet done so is not a dispositive factor. No such provision existed for the state trooper's position at issue in *Foley* and the district court below did not single out that point as being significant in reaching their decision. Similarly, this Court's decision in *Ambach* did not turn on the existence or non-existence of an exception for aliens who have expressed an uneffectuated intent to become a citizen. As the majority noted in *Ambach, supra* at 1599, "An oath of allegiance cannot substitute for the unequivocal legal bond citizenship represents."

Conclusion.

For the reasons stated above the order and judgment below should be reversed.

Respectfully submitted,

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